

Issues to Consider in Authorizing and Issuing Preferred Stock for Alabama Banks

The selected issues below were prepared by Balch & Bingham LLP at the request of the Alabama State Banking Department to assist stand alone Alabama state banks in considering issues related to the issuance of preferred stock in connection with the Emergency Economic Stabilization Act of 2008 (the "Act"). This list is not comprehensive and should not be interpreted as legal advice to any person. Legal advice and conclusions can differ based upon different factual circumstances and events, and an attorney should be consulted on any issue related to the issuance of preferred stock, whether in connection with the Act or otherwise.

Certain provisions of the Emergency Economic Stabilization Act of 2008 permit participating banks and bank holding companies to issue preferred stock to the Department of the Treasury. The following are certain issues and procedures for banks organized under Alabama law to consider in authorizing and issuing preferred stock, although this list is not intended to be exhaustive.

- Under Alabama corporate law, preferred stock may only be authorized in a bank's articles of incorporation.
- To amend a bank's articles of incorporation to authorize preferred stock, holders of at least two thirds of the outstanding shares must approve the amendment at a shareholders' meeting, and the bank must mail notice of the shareholder meeting to each shareholder of record not less than 30 days prior to the meeting.
- The bank should be careful to comply with all applicable laws and regulations under Alabama and federal law, as applicable, in conducting a special meeting and soliciting proxies.
- If the shareholders approve the amendment, the articles of amendment must be filed with the appropriate probate judge. The amendment is not effective until the articles of amendment are filed with the probate judge. See page D-1.
- If the shareholders approve the amendment, the board of directors must thereafter approve by resolution a second amendment to the articles of incorporation setting the exact terms and conditions of the preferred stock to be issued. The second amendment must also be filed with the probate judge before any shares are issued. See page E-1. Legal counsel should be consulted in preparing the second amendment.
- The bank should obtain approval from the state banking department for both articles of amendment as soon as practical and before they are filed.
- The bank should make certain that sufficient common shares are authorized to accommodate the warrants that must be issued.
- Alabama law prohibits banks from repurchasing their own stock, so an issue exists as to whether a stand alone bank can redeem the preferred stock.
- Failure to pay dividends on the preferred stock can result in the imposition of certain penalties on the bank.
- On a case by case basis, other restrictions on the issuance of preferred stock and the payment of dividends may exist in preexisting shareholders' agreements or other arrangements, and banks should be cognizant of such restrictions.

Sample Board Resolutions for Alabama Banks

These sample resolutions were prepared by Balch & Bingham LLP at the request of the Alabama State Banking Department to assist stand alone Alabama state banks in considering issues related to the issuance of preferred stock in connection with the Emergency Economic Stabilization Act of 2008 (the "Act"). Neither these sample resolutions nor the kind of information covered in these resolutions should be interpreted as legal advice to any person. Legal advice and conclusions can differ based upon different factual circumstances and events, and an attorney should be consulted on any matter related to the issuance of preferred stock, whether in connection with the Act or otherwise.

**Resolutions of the Board of Directors of
[name of bank]**

Dated _____, 2008

WHEREAS, _____ (the "Bank") is an Alabama banking corporation;

WHEREAS, the board of directors believes that authorizing preferred stock and allowing the board of directors to set the terms and conditions of such stock without further shareholder approval is in the best interests of the Bank because it will provide the Bank with an additional means of raising capital from time to time;

WHEREAS, in addition to the foregoing, the Bank desires to participate in certain of the programs enacted pursuant to the Emergency Economic Stabilization Act of 2008, including the issuance of preferred stock pursuant to such Act;

NOW, THEREFORE, BE IT RESOLVED, that the board of directors of the Bank hereby calls a special meeting of shareholders to be held on _____, 2008 at _____ [a.m./p.m.] at [the Bank's headquarters];

RESOLVED, that the board of directors hereby approves amendments to the Bank's articles of incorporation authorizing _____ (_____) shares of preferred stock and authorizing the board of directors of the Bank to issue preferred stock and set the terms and conditions of the same (the "Amendments");

RESOLVED, that the board of directors hereby approves the articles of amendment to the Bank's articles of incorporation substantially in the form attached hereto as Exhibit A;

RESOLVED, that the board of directors hereby sets the record date for the special meeting as _____, 2008 for the purpose of a shareholder vote regarding the Amendments;

RESOLVED, that the board of directors recommends that the shareholders approve the Amendments and the articles of amendment substantially in the form attached hereto as Exhibit A;

RESOLVED, that, if articles of amendment are approved by the shareholders, the board of directors authorizes the Bank's chief executive officer or the Bank's _____, or such other officer as the chief executive officer or the _____ may designate, to execute the articles of amendment to the Bank's articles of incorporation and direct that the same be filed with the probate judge of _____ County;

RESOLVED, that the officers of the Bank hereby are authorized to take all necessary and appropriate actions to carry out these resolutions.

Exhibit A

Form of Articles of Amendment Authorizing “Blank Check” Preferred Stock

[attached at page D-1]

Sample Proxy Statement Language for Stand Alone Alabama State Banks

This sample proxy statement language was prepared by Balch & Bingham LLP at the request of the Alabama State Banking Department to assist stand alone Alabama state banks in considering issues related to the issuance of preferred stock in connection with the Emergency Economic Stabilization Act of 2008 (the "Act"). Neither this sample proxy statement language nor the kind of information covered in these disclosures should be interpreted as legal advice to any person. Legal advice and conclusions can differ based upon different factual circumstances and events, and an attorney should be consulted on any matter related to the issuance of preferred stock, whether in connection with the Act or otherwise. This disclosure applies only to banks that are not public companies. Public companies may be subject to more substantial disclosure requirements pursuant to applicable law including, without limitation, Securities and Exchange Commission requirements.

The Board of Directors (the "Board") of _____ (the "Bank") proposes and recommends that the shareholders approve an amendment to the Bank's articles of incorporation authorizing the issuance of _____ shares of preferred stock. The Bank's articles of incorporation do not currently authorize the issuance of preferred stock. The amendment would also authorize the Board to act without further shareholder approval to set the terms and conditions of one or more series of preferred stock subject to the limitations of applicable law.

The Bank's ability to issue preferred stock will provide the Bank with an additional means of raising capital from time to time. In the future, shares of preferred stock could be issued at such prices, at such times, and in such amounts as the Board deems appropriate. Shares could be issued with or without voting rights and on terms that common shareholders may consider to be not in the best interests of common shareholders.

Section 237 of the Alabama Constitution of 1901 requires approval to issue preferred stock by shareholders owning a minimum of two thirds of the outstanding shares of stock, and this amendment would provide that approval. No further approval of shareholders would be required for any future issuance.

In addition to the foregoing, the Board and management have determined that participating in certain programs made available in the Emergency Economic Stabilization Act of 2008 (the "Act") is in the best interests of the Bank. As such, the Board has determined that issuing shares of preferred stock pursuant to the Act and in accordance with the amendment to the articles of incorporation described above is in the best interests of the Bank. All of the terms and conditions of the preferred stock, including the exact number of shares to be issued are not known at this time although the United States Department of Treasury ("Treasury") has released certain characteristics that we expect the preferred stock to contain including: Treasury will obtain warrants for common stock for a number of shares equal to 15% of Treasury's total preferred stock investment; the preferred stock will rank senior to common stock; the preferred stock will pay non-cumulative dividends at a yearly rate of 5% until the fifth anniversary after issuance; the preferred stock will pay non-cumulative dividends at a yearly rate of 9% after the fifth anniversary after issuance; dividends will be paid on a quarterly basis; the Bank may

redeem the preferred stock at any time after the third anniversary of issuance or in certain limited circumstances prior to the third anniversary of issuance; the preferred stock will be non-voting except for shareholder votes that could adversely effect the rights of preferred stockholders; a failure to pay dividends on the preferred stock for six quarters will give the preferred stockholders the right to elect two directors to the Board; certain executive compensation restrictions will be imposed so long as preferred shares or warrants remain outstanding; common dividends may not be increased within the first three years that Treasury owns preferred stock or warrants without Treasury's permission; and other common or preferred shares may not be repurchased within the first three years that Treasury owns preferred stock or warrants without Treasury's permission. Some of these terms may be subject to change, negotiation, and clarification and other terms could be added including, without limitation, any changes necessary to comply with the Act.

By voting for the amendment proposed in this proxy statement, you are voting to grant the Board authority to issue preferred stock at the terms and conditions approved by the Board in its sole discretion including, without limitation, the issuance of the preferred stock on the terms as the Treasury establishes pursuant to the Act.

Assuming a quorum is present at the meeting, approval by the owners of two thirds of the outstanding shares of the Bank is necessary to approve this amendment. Each shareholder shall be entitled to one vote in person or by proxy for each share of common stock held by him or her.

**Sample Articles of Amendment Authorizing “Blank Check” Preferred Stock
for Stand Alone Alabama State Banks**

These sample articles of amendment were prepared by Balch & Bingham LLP at the request of the Alabama State Banking Department to assist stand alone Alabama state banks in considering issues related to the issuance of preferred stock in connection with the Emergency Economic Stabilization Act of 2008 (the “Act”). Neither these sample articles of amendment nor the kind of information covered in this document should be interpreted as legal advice to any person. Legal advice and conclusions can differ based upon different factual circumstances and events, and an attorney should be consulted on any matter related to the issuance of preferred stock, whether in connection with the Act or otherwise.

STATE OF ALABAMA)

COUNTY OF _____)

**ARTICLES OF AMENDMENT
TO
ARTICLES OF INCORPORATION
OF
[NAME OF BANK]**

Pursuant to ALA. CODE § 10-2B-10.06, the undersigned herewith sets forth and files the following Articles of Amendment to the Articles of Incorporation of _____.

1. The name of the banking corporation is _____ (the “Bank”).
2. The amendment [**deletes/amends**] Section ____ of the Bank’s articles of incorporation and inserts the following as a new Section ____ in the Bank’s articles of incorporation [**NOTE: this portion should be tailored to match specific provisions in existing articles of incorporation**]:

“ ____ In addition to common stock authorized elsewhere herein, the Bank shall have the authority to issue _____ (_____) shares of \$_____ par value preferred stock (“Preferred Stock”). Authority is hereby expressly granted to and vested in the Board of Directors of the Bank to provide for the issuance of Preferred Stock in one or more series, and in connection therewith to establish by resolution or resolutions of the Board of Directors from time to time providing for the issuance of such series, the number of Shares to be included in such series, the designation thereof, and the relative rights, preferences, and limitations of each series and the variations in such rights, preferences, and limitations as between series, all to the fullest extent permitted by applicable law. Without limiting the generality of

the grant of authority contained in the preceding sentence, the Board of Directors is authorized to determine any or all of the following with respect to any series of the Preferred Stock, and the Shares of each series may vary from the Shares of any other series in any or all of the following respects:

- (i) The number of Shares of such series (which may subsequently be increased, except as otherwise provided by the resolution or resolutions of the Board of Directors providing for the issue of such series, or decreased to a number not less than the number of Shares then outstanding) and the distinguishing designation thereof;
- (ii) The distribution, dividend, and liquidation rights, if any, of such series; the distribution, dividend, or liquidation preferences, if any, as between such series and any other class or series of stock; whether and the extent to which Shares of such series shall be entitled to participate in any distributions, dividends, or liquidation proceeds with Shares of any other class or series of stock; whether and the extent to which any distributions, dividends, or liquidation proceeds on such series shall be cumulative, noncumulative, or partially cumulative, and any limitations, restrictions, or conditions on the payment of such distributions, dividends, or liquidation proceeds; and whether and the extent to which Share dividends of one series of Preferred Stock may be issued in respect of Shares of another series or class without approval of the holders of the series from which the Share dividend is to be issued;
- (iii) The time or times during which, the price or prices at which, and any other terms or conditions on which, the shares of such series may be redeemed, if redeemable, including without limitation, whether redeemable at the option of the Bank, the shareholder, or any other person;
- (iv) Other economic features of such series;
- (v) The voting powers, if any, in addition to the voting powers prescribed by law for Shares of such series as a voting group, if any, and the conditions upon the effectiveness, and the terms and limitations for exercise of, such voting powers;
- (vi) Whether Shares of such series shall be convertible into or exchangeable for Shares of any other series or class of stock (including without limitation, Shares of Common Stock) or any other securities, and the terms and conditions, if any, applicable to such right, including without limitation, whether convertible

or exchangeable at the option of the Bank, the shareholder or any other person;

- (vii) The terms and conditions of applicable purchase, retirement, or sinking fund, if any, which may be provided for the Shares of such series;
- (viii) The restrictions, if any, upon the creation of indebtedness, payment of distributions on other classes or series of stock, or creation or issuance of additional securities, ranking on a parity with or prior to such series; and
- (ix) Other relative, participating, optional, or special rights, qualifications, limitations, values, or restrictions, if any, for Shares of such series.

Each such series of preferred stock shall be eligible for issue upon the Board of Directors' duly adopting the appropriate resolution or resolutions and filing articles of amendment as required by applicable law, and shall be effective without shareholder action."

3. The date of the adoption of each of the above described amendment is _____, 200__.

4. Of the _____ shares of the Bank's common stock outstanding and entitled to be cast on each amendment described herein, _____ shares were indisputably represented at the _____, 2008 meeting. _____ undisputed votes were cast to approve the amendment described in Section 2 herein. The number of shares cast for the amendment was sufficient to approve such amendment.

[signature page follows]

IN WITNESS WHEREOF, the undersigned has executed these Articles of Amendment to Articles of Incorporation on this ___th day of _____, 200__.

[NAME OF BANK]

By: _____
Its: _____

**Sample Articles of Amendment Setting Terms and Conditions of Preferred Stock
for Stand Alone Alabama State Banks**

These sample articles of amendment were prepared by Balch & Bingham LLP at the request of the Alabama State Banking Department to assist stand alone Alabama state banks in considering issues related to the issuance of preferred stock in connection with the Emergency Economic Stabilization Act of 2008 (the "Act"). Neither these sample articles of amendment nor the kind of information covered in this document should be interpreted as legal advice to any person. Legal advice and conclusions can differ based upon different factual circumstances and events, and an attorney should be consulted on any matter related to the issuance of preferred stock, whether in connection with the Act or otherwise. In particular, this document contains descriptions of preferred stock to be issued pursuant to the Act as such descriptions are available at the time this document was drafted, and this document is qualified in its entirety by subsequent modifications to such descriptions.

STATE OF ALABAMA)

COUNTY OF _____)

**ARTICLES OF AMENDMENT
TO
ARTICLES OF INCORPORATION
OF
[NAME OF BANK]**

Pursuant to ALA. CODE § 10-2B-6.02(d), the undersigned herewith sets forth and files the following Articles of Amendment to the Articles of Incorporation of _____.

1. The name of the bank is _____ (the "Bank").

2. The Bank's articles of incorporation hereby are amended to set the preferences, limitations, and relative rights of a series of its Preferred Stock to be designated "Series 2008 Senior Preferred Stock." The preferences, limitations, relative rights, and other matters relating to the Series 2008 Senior Preferred Stock as set forth in Attachment 1 hereto.

3. The resolutions adopting the amendments herein were adopted on _____, 2008.

4. The board of directors duly adopted the amendment.

[signature page follows]

IN WITNESS WHEREOF, the undersigned has executed these Articles of Amendment to Articles of Incorporation on this ___th day of _____, 200__.

[NAME OF BANK]

By: _____
Its: _____

ATTACHMENT 1

Terms of Series 2008 Senior Preferred Stock

1. **Number of Shares.** The series of Preferred Stock designated and known as “Series 2008 Senior Preferred Stock” shall consist of _____ shares.

2. **Dividends.** The Series 2008 Senior Preferred Stock shall receive non-cumulative dividends at a rate of 5% per year until the fifth anniversary of the date the Series 2008 Senior Preferred Stock is purchased. Thereafter, the Series 2008 Senior Preferred Stock shall receive non-cumulative dividends at a rate of 9% per year. Dividends are payable quarterly in arrears on February 15, May 15, August 15, and November 15 of each year. If the dividends on the Series 2008 Senior Preferred Stock are not paid in full for six dividends periods, whether or not consecutive, the Series 2008 Senior Preferred Stock will have the right to elect two directors. The right to elect directors will end when full dividends have been paid for four consecutive dividend periods.

3. **Liquidation Preference.** In the event of any liquidation, dissolution or winding up of the Corporation, whether voluntary or involuntary, the Series 2008 Senior Preferred Stock shall rank senior to common stock and *pari passu* with existing preferred shares other than preferred shares which by their terms rank junior to any existing preferred shares.

4. **Voting Rights.** The Series 2008 Senior Preferred Stock shall be non-voting other than class voting rights on (i) any authorization or issuance of shares ranking senior to the Series 2008 Senior Preferred Stock, (ii) any amendment to the rights of Series 2008 Senior Preferred Stock, or (iii) any merger, exchange, or similar transaction which would adversely affect the rights of Series 2008 Senior Preferred Stock.

5. **Redemption.** Series 2008 Senior Preferred Stock may not be redeemed for a period of three years from the date of purchase of such stock, except with the proceeds from a “Qualified Equity Offering” (as such term is defined below) which results in aggregate gross proceeds to the Bank of not less than 25% of the issue price of the Series 2008 Senior Preferred Stock. After the third anniversary of the date the Series 2008 Senior Preferred Stock is issued, the Series 2008 Senior Preferred Stock may be redeemed, in whole or in part, at any time and from time to time, at the option of the Bank. All redemptions of the Series 2008 Senior Preferred Stock shall be at 100% of its issue price, plus (i) in the case of cumulative Series 2008 Senior Preferred Stock, any accrued and unpaid dividends and (ii) in the case of non-cumulative Series 2008 Senior Preferred Stock, accrued and unpaid dividends for the then current dividend period (regardless of whether any dividends are actually declared for such dividend period), and shall be subject to the approval of the Bank’s primary federal bank regulator. “Qualified Equity Offering” shall mean the sale by the Bank, after the date of issuance of Series 2008 Senior Preferred Stock, of Tier 1 qualifying perpetual preferred stock or common stock for cash. Following the redemption in whole of the Series 2008 Senior Preferred Stock held by the United States Department of the Treasury (“UST”), the Bank shall have the right to repurchase any other equity security of the Bank held by the UST at fair market value.

6. Restrictions and Limitations.

(a) For so long as any Series 2008 Senior Preferred Stock is outstanding, no dividends may be declared or paid on junior preferred shares, preferred shares ranking *pari passu* with the Series 2008 Senior Preferred Stock, or common shares (other than in the case of *pari passu* preferred shares, dividends on a pro rata basis with the Series 2008 Senior Preferred Stock), nor may the Bank repurchase or redeem any junior preferred shares, preferred shares ranking *pari passu* with the Series 2008 Senior Preferred Stock or common shares, unless (i) in the case of cumulative Series 2008 Senior Preferred Stock all accrued and unpaid dividends for all past dividend periods on the Series 2008 Senior Preferred Stock are fully paid or (ii) in the case of non-cumulative Series 2008 Senior Preferred Stock the full dividend for the latest completed dividend period has been declared and paid in full.

(b) UST's consent shall be required for any increase in common dividends per share until the third anniversary of the date the Series 2008 Senior Preferred Stock are issued unless prior to such third anniversary the Series 2008 Senior Preferred Stock is redeemed in whole or UST has transferred all of the Series 2008 Senior Preferred Stock to third parties.

(c) As a condition of UST's purchase of Series 2008 Senior Preferred Stock, the Bank and its senior executive officers covered by the Emergency Economic Stabilization Act of 2008 (the "EESA") shall modify or terminate all benefit plans, arrangements, and agreements (including golden parachute agreements) to the extent necessary to be in compliance with, and following the issuance of Series 2008 Senior Preferred Stock and for so long as UST holds any equity or debt securities of the Bank, the Bank agrees to be bound by, the executive compensation and corporate governance requirements of Section 111 of the EESA and any guidance or regulations issued by the Secretary of the Treasury on or prior to the date of the issuance of Series 2008 Senior Preferred Stock to carry out the provisions of such subsection. As an additional condition to UST's purchase of Series 2008 Senior Preferred Stock, the Bank and its senior executive officers covered by the EESA shall grant to UST a waiver releasing UST from any claims that the Bank and such senior executive officers may otherwise have as a result of the issuance of any regulations which modify the terms of benefits plans, arrangements, and agreements to eliminate any provisions that would not be in compliance with the executive compensation and corporate governance requirements of Section 111 of the EESA and any guidance or regulations issued by the Secretary of the Treasury on or prior to the date of the issuance of Series 2008 Senior Preferred Stock to UST to carry out the provisions of such subsection.

7. Repurchases. UST's consent shall be required for any share repurchases (other than (i) repurchases of the Series 2008 Senior Preferred Stock and (ii) repurchases of junior preferred shares or common shares in connection with any benefit plan in the ordinary course of business consistent with past practice) until the third anniversary of the date the Series 2008 Senior Preferred Stock was issued unless prior to such third anniversary the Series 2008 Senior Preferred Stock is redeemed in whole or UST has transferred all of the Series 2008 Senior Preferred Stock to third parties. In addition, there shall be no share repurchases of junior preferred shares, preferred shares ranking *pari passu* with the Series 2008 Senior Preferred Stock, or common shares if prohibited elsewhere herein.

8. Transferability. The Series 2008 Senior Preferred Stock will not be subject to any contractual restrictions on transfer. The Bank will file a shelf registration statement covering the Series 2008 Senior Preferred Stock as promptly as practicable after the date of issuance and, if necessary, shall take all action required to cause such shelf registration statement to be declared effective as soon as possible. The Bank will also grant to UST piggyback registration rights for the Series 2008 Senior Preferred Stock and will take such other steps as may be reasonably requested to facilitate the transfer of the Series 2008 Senior Preferred Stock including, if requested by UST, using reasonable efforts to list the Series 2008 Senior Preferred Stock on a national securities exchange. If requested by UST, the Bank will appoint a depository to hold the Series 2008 Senior Preferred Stock and issue depository receipts. **[NOTE: it is not yet clear how this provision will apply to a non-public bank or a stand alone bank]**

[Other terms may be required by the UST or the applicable federal regulator as a condition to purchase depending upon, among other things, the particular condition of the bank]